(1) 89-634

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Petitioner,

v.

BANNER INDUSTRIES, INC., *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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63 pp

QUESTION PRESENTED

Section 4221(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1401(a), mandates that all disputes between a multiemployer pension plan and an employer regarding the plan's determination of withdrawal liability shall be resolved through arbitration proceedings initiated within a statutorily prescribed period. Section 4221(b), 29 U.S.C. § 1401(b), provides that "[i]f no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts [of withdrawal liability] demanded by the plan sponsor . . . shall be due and owing on the schedule set forth by the plan sponsor."

The question presented is whether an employer that does not initiate an arbitration proceeding pursuant to subsection (a), but instead brings an action in the district court in an attempt to have the court resolve a dispute that the statute requires to be arbitrated, may be excused by the district court from its failure to initiate arbitration pursuant to subsection (a) and permitted to initiate arbitration proceedings after the period prescribed by the statute has expired.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 875 F.2d 1285 and is reproduced as Appendix C, *infra*, pp. 5a-21a. The opinion of the United States District Court for the Northern District of Illinois is reported at 657 F. Supp. 875 and is reproduced as Appendix D, *infra*, pp. 22a-43a.

JURISDICTION

The district court's jurisdiction was invoked under 29 U.S.C. §1451. The jurisdiction of the court of appeals was invoked under 28 U.S.C. §1291. The judgment of the court of appeals affirming the district court was entered on May 23, 1989, and its order denying rehearing was entered on July 20, 1989. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4219(b) of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA") 29 U.S.C. §1399(b), provides as follows:

> As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall -
>
> (A) notify the employer of -
>
> (i) the amount of the liability, and
>
> (ii) the schedule for liability payments. and

(B) demand payment in accordance with the schedule.

No later than 90 days after the employer receives the notice described in paragraph (1), the employer -

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

After a reasonable review of any matter raised, the plan sponsor shall notify the employer of -

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

Section 4221 of ERISA, as amended by MPPAA, 29 U.S.C. § 1401, provides in pertinent part, as follows:

(a)(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be

resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of -

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b) (2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399 (b)(1) of this title. . . .

(b)(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. . . .

STATEMENT OF THE CASE

1. The Parties

Central States, Southeast and Southwest Areas Pension Fund (hereinafter "Central States") is a multiemployer pension plan within the meaning of Sections 3(2), (35), and (37) of ERISA, 29 U.S.C. § 1002(2), (35), and (37).[1] The trustees of Central States at the time this action was commenced are collectively the "plan sponsor" within the meaning of 29 U.S.C. § 1002(16)(B).

[1] Citations to ERISA will hereinafter be made to its codification at 29 U.S.C. §§ 1001 *et seq.*

Banner Industries, Inc. ("Banner") is a Delaware corporation and was the parent corporation of Commercial Lovelace Motor Freight ("CLMF"), which previously made pension fund contributions to Central States.[2]

2. The Statute

Title IV of the ERISA, 29 U.S.C. §§ 1301 *et seq.* was amended by MPPAA in 1980 and codified in relevant part at 29 U.S.C. §§ 1381-1451. Under the MPPAA amendments, an employer that withdraws from a multiemployer pension plan is liable to the plan for its share of the plan's unfunded vested benefit liability. The employer's share is called its "withdrawal liability." 29 U.S.C. § 1381. Upon determining that a withdrawal has occurred, the plan sponsor is required to notify the employer, provide a schedule of payments calculated in accordance with the statute and "demand payment in accordance with the schedule." 29 U.S.C. § 1399(b)(1).

If the employer disputes the plan's determination of a withdrawal or the calculation of liability, the statute provides a two-step review process. First, the employer may request review by the plan itself within 90 days of the initial plan notice. 29 U.S.C.

[2] In addition to Central States and Banner, the following were also parties to the proceeding in the court of appeals: Pepsico, Inc.; Loran W. Robbins; Marion W. Winsteed; Robert J. Baker; Howard McDougall; Arthur H. Bunte, Jr.; R.V. Pulliam, Sr.; Robert C. Sansone; R. Jerry Cook Albert D. Matheson; Earl Jennings; Harold J. Yates; Thomas J. Duffey; John F. Spickerman, Sr.; Herman A. Lucking, Jr.; William J. Kennedy; Jack A. Shutz; Bernard S. Goldfarb; Andrew G. Massa; Roy L. Williams; Robert Holmes; Donald Peters; Jackie Presser; Joseph W. Morgan; Frank N. Ranney; and Walter W. Teaque.

§ 1399(b)(2). If the employer still disputes the liability assessment following the plan's review, it may initiate arbitration within 60 days of the plan's response (or, if earlier, 120 days of the request for review). 29 U.S.C. § 1401(a). If this statutory review process is not invoked, the statute provides that "the amounts demanded by the plan sponsor . . . shall be due and owing on the schedule set forth by the plan sponsor." 29 U.S.C. § 1401(b)(1).

3. The Proceedings Below

Banner in 1983 created an employee stock ownership plan (ESOP) on behalf of the employees of CLMF and divested itself of ownership of CLMF by transferring its stock to the ESOP and to other individuals. Subsequently CLMF was merged with another company, Lee Way Motor Freight. The merged company filed bankruptcy in 1985 and thereafter ceased contributing to Central States.

Central States determined that a withdrawal had occurred and that Banner was the liable employer. On March 25, 1986, Central States notified Banner of its assessment of $19,808,781.43 in withdrawal liability and demanded payment in the amount of $451,876.69 per month. On May 1, 1986, Banner commenced the instant action in the district court seeking declaratory relief that it was not liable as an employer under ERISA. Banner did not initiate the review process ordained by the statute, however, and on June 29, 1986, the time for Banner to initiate that process expired.

Central States counterclaimed for interim payments of withdrawal liability pursuant to 29 U.S.C. § 1399(c), moved to dismiss the complaint due to Banner's fail-

ure to initiate the statutory review process, and—when the time for Banner to initiate the statutory review process expired—Central States asserted that the amount it had demanded was due and owing under 29 U.S.C. § 1401(b)(1).

The district court granted Central States' motion to dismiss, holding that Banner's contentions were the kind of disputes that the statute "unequivocally requires . . . be resolved in arbitration." Appendix D, *infra*, pp. 38a-39a. The district court refused, however, to follow the provision in 29 U.S.C. § 1401(b)(1), under which the amounts demanded by the plan sponsor are due and owing if no arbitration has been initiated under the statute. Instead, the court held that "Banner's filing of this suit tolled the statutory time frames set forth in § 1401(a)(1)" (Appendix D, *infra*, p. 40a) and denied Central States' motion for summary judgment for the amount it had demanded on March 25, 1986.

The court of appeals affirmed the district court in all respects. With regard to the district court's holding that Banner's legal action had tolled its statutory deadline for commencing the review process mandated by the statute, the appellate court adopted a "deferential standard of review." Believing that the district court "could have ruled either way," the appellate court upheld the district court's ruling on the ground that "the district court did not abuse its discretion in holding that Banner did not waive its defenses to withdrawal liability by first seeking declaratory relief in the district court." Appendix C, *infra*, p. 21a.

REASONS FOR GRANTING THE WRIT

I. The decision of the court below that permits an employer to initiate the statutory review process after the prescribed deadline is in conflict with the decision to the contrary of the District of Columbia Circuit.

"[A]rbitration reigns supreme under the MPPAA. And the consequences of failing to arbitrate . . . are clearly enunciated by the statute." *I.A.M. Nat'l Pension Fund, Plan A v. Clinton Engines Corp.*, 825 F.2d 415, 422 (D.C. Cir. 1987). So stating, the District of Columbia Circuit held two employers barred from raising defenses to a pension plan's action to collect withdrawal liability. Both employers had sought to raise defenses for the first time in the district court when the plan sued to collect liability it had previously demanded from them. The period for initiating arbitration had expired by the time of the first lawsuit (against Clinton Engines), and the district court held the employer's defenses barred. The second employer, Cooper Industries, filed a counterclaim for declaratory and injunctive relief within the limitations period for initiating arbitration and prevailed in the district court on the merits. The court of appeals nonetheless followed 29 U.S.C. § 1401(b)(1) and reversed the district court's ruling in favor of Cooper Industries. In view of the clear statutory provision that "[i]f no arbitration proceeding has been initiated . . . , the amounts demanded by the plan sponsor . . . shall be due and owing . . . " (29 U.S.C. §1401(b)(1)), the District of Columbia Circuit held that "[h]aving failed to initiate arbitration, these employers [Clinton Engines and Cooper] were barred from raising their defenses in

collection actions brought by the Fund." *Clinton Engines*, 825 F.2d at 429.

In stark contrast to the holding of the District of Columbia Circuit, the court below ruled in the instant case that "this strict forfeiture rule is relaxed . . . if an employer has taken actions warranting tolling of the statutory deadlines." Appendix C, *infra*, p. 16a. The decision of the court below thus could not be more at odds with the District of Columbia Circuit rule. The District of Columbia Circuit correctly allows a district court no discretion and holds the statutory bar absolute in a case in which the employer sought to substitute a court action for the statutory review process—even in a case in which the employer prevailed on his defense in the district court. The court below in such a case defers to the district court's discretion in choosing not to enforce the statutory bar.[3] By permitting the district court's "exercise of discretion" to stand without exercising its own independent appellate review, the court below left standing the district court's erroneous decision to ov-

[3] The district court relied upon *Republic Indus., Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). That case held that a facial constitutional attack on the entire arbitration requirement where that question had not previously been definitively decided, tolled the arbitration limitations period. *Id.* at 644. In *Republic Industries*, therefore, the employer had brought to the court an unresolved question that had not been determined by the plan and that was beyond the arbitrator's authority to decide—the constitutionality of the federal statute under which he was empowered to act. The court held that the facial constitutional challenge was appropriately brought in court. In the instant case, by contrast, the district court found that Banner's claim was not properly brought in court.

erride an express statutory requirement and placed itself squarely in conflict with the District of Columbia Circuit on the question presented in the instant case.

II. The erroneous decision of the court below thwarts an express congressional mandate and raises a federal policy question of national importance

Congress, in adopting the MPPAA amendments, sought to ensure the swift and efficient resolution of withdrawal liability disputes and to discourage dilatory litigation. *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148, 1152-53 (7th Cir. 1989) (*en banc*). Congress did not equivocate when it wrote the statutory arbitration rule—"[*a*]*ny* dispute under [MPPAA's withdrawal liability provisions] *shall* be resolved through arbitration." 29 U.S.C. § 1401(a) (emphasis added). And Congress set strict time limits for arbitration proceedings, with an explicit consequence for employers that fail to meet those limits—"the amounts demanded by the plan sponsor . . . shall be due and owing on the schedule set forth by the plan sponsor." 29 U.S.C. § 1401(b)(1). Despite this plain congressional direction, the ruling of the court below in the instant case countenances Banner's dilatory litigation and allows Banner to escape the plainly prescribed consequence of its calculated decision to defy the statute.

The case before the district court was quite simple. The statutory bar had run against Banner's defenses well before the district court's ruling. While Banner had filed its lawsuit within the statutory period for initiating the review process, it had not taken the

simple step available to it to preserve its right to arbitrate. It had not initiated the statutory review process. Had it done so, it could have sought prior determination from either the court or from the arbitration tribunal that the contentions it presented to the court justified a stay of the arbitration proceeding. Had Banner followed the statutory scheme for resolving withdrawal liability disputes, either the court or the arbitration tribunal could have decided the proper sequence of the two parallel proceedings. Instead, Banner chose to proceed in a manner that foreclosed any independent prior determination of the proper timing of the statutory review process. Taking the erroneous position that arbitration was not required, Banner plunged ahead on its own course outside the statute. Banner's situation thus is not materially different from the situation faced by the employer in *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118 (3d Cir. 1986), whose attempt to raise issues concerning its withdrawal liability after the statutory period was rejected by the court. Observing that the employer could easily have preserved its rights by initiating the statutory review process, the Third Circuit explained its holding as follows:

> Because so many other satisfactory options are available to a corporation, we are persuaded that what appears superficially to be a dilemma is not so. The result we reach here is neither onerous, nor inconsistent with the objectives of ERISA and the MPPAA—maximum protection of pension plan participants. Sentinel gambled and lost. It hoped that it would not be subsequently deemed a single

> employer along with B&W under a controlled group theory. The facts were found against it and it must now pay the price.

Id. at 129.

The district court in the instant case correctly ruled that Banner's defenses were arbitrable and, therefore, not properly before the court. The court then turned to the availability of arbitration. It held that filing a lawsuit that questioned the plan's determination of Banner's status as an employer was sufficient to justify the court's retroactive tolling the arbitration statute. *Banner*, 657 F. Supp. at 885. Federal courts, however, ought not invoke rules drawn from principles of equity to override the intent of Congress.

> Accordingly, where any penalty of forfeiture is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred, for it would be in contravention of the direct expression of the legislative will . . . [A] court of equity ha[s] no right to interfere and, by injunction or decree, to virtually repeal the express provisions of a positive statute, or defeat their operation in the particular case.

Clark v. Barnard, 108 U.S. 436, 457 (1883). This principle was recently recognized and applied by the court below in another ERISA case, but was not followed in the instant case. *Central States, Southeast and Southwest Areas Pension Fund* v. *Bellmont Trucking Co.*, 788 F.2d 428, 433 (7th Cir. 1986) (the courts may not create equitable exceptions to MPPAA).

In reviewing the district court's ruling, the court below failed to follow its own previous decisions regarding MPPAA arbitrations. In *Robbins v. B and B Lines, Inc.*, 830 F.2d 648 (7th Cir. 1987), the court held that even where an employer had timely lodged its demand for arbitration with the proper authorities, its failure to follow the strict rules of the pension plan and the American Arbitration Association by timely paying a filing fee, rendered its "initiation" of arbitration incomplete. B and B Lines, the employer, was barred from raising its defenses. And in *Robbins v. Chipman Trucking, Inc.*, 866 F.2d 899 (7th Cir. 1988), the employer attempted to toll the arbitration deadline by seeking additional review by the pension plan. The court ruled that the statutory time limits were to be strictly enforced and that an employer could not substitute its own procedures for those of the statute.

The instant case is one in which the employer made a deliberate and calculated decision to challenge the plan sponsor's determination in court, and not before the arbitrator. Banner's conduct thus is less deserving of lenient treatment than the conduct of the employers in the two *Robbins* cases. In those cases, the employers did nothing that was inconsistent with an intention to initiate the statutory review process—and in the *B and B Lines* case, the employer actually took a timely, albeit ineffective, step to initiate arbitration. In each case, however, the Seventh Circuit held—correctly—that the employer's failure to initiate arbitration in a timely fashion was an insurmountable bar to any subsequent attempt to question the plan's determinations regarding its withdrawal liability.

A similar holding in the instant case should have followed *a fortiorari* from the decisions in the two *Robbins* cases. Banner did not merely fail to meet the arbitration deadline, it openly defied the unmistakeable statutory command that its dispute "shall be resolved through arbitration" (29 U.S.C. § 1401(a)). Erroneously asserting that it was not an "employer" within the meaning of 29 U.S.C. § 1401(a)(1), Banner invoked the very statutory provision that it refused to honor and brought its case to the district court, without initiating the review process prescribed by law.

The statutory review process and the time periods specified for its invocation are crucial to the operation of the statute. Congress ordained arbitration as an important means of preserving the resources of pension plans and protecting those resources from the ravages of wasteful litigation brought by employers seeking to avoid their pension obligations. In order to effectuate its clearly expressed mandate, Congress set definite time periods to ensure the speedy initiation of the arbitration process and established a clear consequence for an employer's failure to act within those time periods. The decision of the court below runs afoul of that congressional scheme and holds out to employers the hope that, by bringing their disputes to the courts, they can ignore the statutorily-mandated review process—at least until the court decides the issues they present. That invitation to abuse the judicial process and defy the plainly expressed will of Congress should not be permitted to stand.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 18, 1989

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 20, 1989

Nos. 87-1700, 87-1959, 87-1960 & 87-2794

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

BANNER INDUSTRIES, INC.,
Plaintiff Counterdefendant-Appellant, Cross-Appellee,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and its present Trustees in their capacity as Trustees, et al.,
Defendants Counterplaintiffs-Appellees, Cross-Appellants,

and

PEPSICO, INC., et al.,
Defendants.

Appeals from the United District Court for the Northern District of Illinois, Eastern Division.

No. 86 C 3046

Paul E. Plunkett, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by Defendant Counterplaintiff-Appellee, Cross-Appellant, Central States, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 23, 1989

Nos. 87-1700, 87-1959, 87-1960 & 87-2794

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

BANNER INDUSTRIES, INC.,
Plaintiff Counterdefendant-Appellant, Cross-Appellee,

vs.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,
Defendants Counterplaintiffs-Appellees, Cross-Appellants,

and

PEPSICO, INC., et al.,
Defendants.

Appeals from the United District Court for the Northern District of Illinois, Eastern Division.

No. 86 C 3046

Judge Paul E. Plunkett

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date. Each party shall bear its own costs.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 87-1700, 87-1959, 87-1960 & 87-2794

BANNER INDUSTRIES, INC.,

Plaintiff Counterdefendant-Appellant, Cross-Appellee,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and its present Trustees in their capacity as Trustees, et al.,

Defendants Counterplaintiffs-Appellees, Cross-Appellants,

and

PEPSICO, INC., et al.,

Defendants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 86-C-3046—**Paul E. Plunkett**, *Judge*.

ARGUED JANUARY 7, 1988—DECIDED MAY 23, 1989

Before FLAUM, MANION and KANNE, *Circuit Judges.*

MANION, *Circuit Judge.* Banner Industries, Inc. (Banner) brought this action against Central States, Southeast

and Southwest Areas Pension Fund (Central States), among others. Banner sought a declaration that it not be liable for any portion of a demand for withdrawal liability made upon Banner by Central States pursuant to the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1382 (MPPAA). Withdrawal liability is the amount owed a pension plan by an employer which reduces or ceases its plan contributions. Central States moved to dismiss and moved for summary judgment on its counterclaim for interim payments.

The two questions certified on appeal are (1) whether a control group employer remains subject to MPPAA arbitration requirements when that corporation has divested itself of its subsidiary before the subsidiary's withdrawal; and (2) whether (assuming arbitration is required) Banner's filing in federal court raising the issue whether under these circumstances a party is subject to the MPPAA mandatory arbitration procedures, tolls the time period for initiating arbitration. For the reasons stated below, we answer both in the affirmative, and affirm the district court's dismissal of Banner's action and grant of summary judgment for Central States on its counterclaim.

I. FACTS

For purposes of a motion to dismiss, this court accepts a plaintiff's well-pleaded allegations as true. *Repp v. F.E.L. Publications, Ltd.*, 688 F.2d 441 (7th Cir. 1982). The facts of this case are alleged as follows. Before March 1983, Commercial was a wholly-owned subsidiary of Banner engaging in interstate trucking. The International Brotherhood of Teamsters represented the majority of Commercial's hourly employees. Commercial contributed to various multiemployer pension plans (principally Central States) pursuant to collective bargaining agreements with the Teamsters.

During 1982 Banner hired a consultant for advice on reversing losses suffered by Commercial. This consultant recommended a 20 percent reduction in wages, salaries,

and benefits of all Commercial's employees. In return for such reductions, the consultant suggested that majority control of Commercial be transferred to the employees through an Employee Stock Ownership Program (ESOP). Commercial presented the Commercial Lovelace Compensation Program to its employees in February 1983. Under this proposed program, Commercial's employees would absorb wage and benefit reductions of approximately 20 percent of total compensation and benefits. In exchange, Commercial and Banner would establish an ESOP Trust and transfer to it 50.01 percent of the issued and outstanding shares of Commercial stock. Nearly 90 percent of Commercial's employees signed up for the Program. Commercial, on February 20, 1983, announced that the Program would be launched in March 1983.

Commercial transferred 4,001,000 shares of its common stock, representing 50.01 percent of Commercial's issued and outstanding shares as of that date, to the ESOP Trust effective March 1, 1983. Banner thereby became a minority shareholder in Commercial and no longer controlled Commercial's operations. After the Program was implemented, Commercial continued making payments to Central States pursuant to its obligations under collective bargaining agreements with the Teamsters.

During July 1983, Banner sold 790,000 shares of Commercial stock to CL Investors, a partnership consisting of certain Commercial officers and directors. This reduced Banner's ownership in Commercial to approximately 40 percent. In February 1985, Banner sold another 400,000 shares of Commercial stock to Gerard W. McIntyre, the president of Commercial, thus reducing Banner's ownership in Commercial to approximately 35 percent. In June 1985, Banner sold its remaining 2,809,000 shares of Commercial stock to McIntyre.

In April of 1984, Commercial opened negotiations with Pepsico to purchase all of the stock of its wholly owned subsidiary, Leeway Motor Freight, Inc. Leeway engaged in the transportation of goods in interstate commerce.

Leeway's collective bargaining agreements required it to contribute to Central States. But for the fiscal year ending December 31, 1983, Leeway had a pretax loss of approximately $24 million on revenues of $170 million. For the five-year period between 1979 through 1983, its aggregate losses from operations totaled almost $75 million. Through the initial three months of 1984, Leeway's operating losses reached approximately $6.6 million. On June 2, 1984, Commercial's board of directors voted five to two in favor of the Leeway acquisition. The two directors voting against that acquisition were officers of Banner who had been named to the board by Banner. As it turned out, the rest of the board should have listened to the dissenters.

Pepsico and Commercial executed a Stock Purchase Agreement under which Commercial agreed to pay $500,000 cash and turn over to Pepsico $7.5 million from the sale of Leeway equipment to a third party in return for all of the issued and outstanding shares of Leeway. Additionally, Commercial and Pepsico agreed that immediately before closing the sale Leeway would transfer (in the form of a dividend) certain parcels of real property to Pepsico, which then would be leased back to Leeway. Hence, the acquisition of Leeway by Commercial was financed primarily by the sale or transfer of Leeway assets, with the proceeds or the assets themselves returning to Pepsico. Leeway's operations after Commercial's purchase were initially financed through a working capital loan arranged by Pepsico by a factoring of receivables. But it was necessary to liquidate additional assets, and some of Leeway's post-acquisition asset sales were made to Pepsico; proceeds of other sales were transferred to Pepsico.

Throughout the second half of 1984 Leeway sustained heavy losses. Its operations had been largely or completely terminated by December 1984. The Leeway acquisition adversely affected Commercial. Commercial's overhead and expenses increased significantly due to the Leeway personnel absorbed by Commercial when operations were

consolidated. Commercial itself lost $2.9 million in the six months from July 1, 1984, to December 31, 1984; it lost $1.1 million in December 1984 alone. Before the acquisition of Leeway, Commercial had been a viable company with positive cash flow and improving operating ratio. But the effort to absorb Leeway drained Commercial's cash reserves and caused Commercial to suffer ballooning losses. It was clear by February 1985 that Commercial could not survive.

In March 1985, Commercial had ceased operations and withdrawn from the pension fund. Following an employer's withdrawal from a multiemployer pension plan, that plan's sponsor must determine the amount of withdrawal liability owed, notify the employer of that amount, and demand payment. 29 U.S.C. §§ 1382, 1399(b)(1); *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, No. 87-2108, slip op. at 5 (7th Cir. April 13, 1989). Central States claims that Commercial owes $19,808,781.43 for pension withdrawal liability pursuant to the MPPAA. On March 25, 1986, Central States demanded that Banner pay Commercial's withdrawal liability based on its determination that "a principal purpose" of Banner in divesting itself of Commercial was to "evade or avoid" withdrawal liability within the meaning of 29 U.S.C. § 1392(c).[1] Under the MPPAA and its arbitration provision, 29 U.S.C. § 1401(a), that determination is arbitrable.[2]

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[1] 29 U.S.C. § 1392(c) provides: "If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction."

[2] 29 U.S.C. § 1401(a) provides: "Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title *shall* be resolved through arbitration. . . ." (Emphasis added.)

The term "shall" ordinarily is mandatory and not precatory. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). "Shall" always

(Footnote continued on following page)

On May 1, 1986, Banner filed a complaint in the district court seeking a declaratory judgment that it ceased to be an "employer" under § 1401(a) as of March 1983, and therefore was not subject to arbitration, and, more important, that it was not responsible for Commercial's withdrawal liability. On August 1, 1986, Central States moved to dismiss Banner's complaint. Central States contended that Banner's claim that it was no longer an "employer" was arbitrable, but that Banner had waived arbitration—and thus could not defend against Central States' demand—by seeking a declaratory judgment as to its status as an employer instead of timely commencing arbitration.

Banner's Claims.

Banner's position has been that before a district court can order Banner to make interim payments and to proceed to arbitration, it must first determine whether Banner was an employer at the time of the withdrawal. The MPPAA provides that an employer may be assessed with withdrawal liability, and that only an "employer" can be required to make interim payments and go to arbitration. Because the MPPAA only applies to employers' withdrawals from multiemployer plans, its dispute resolution or interim payments provisions likewise apply only to employers.

Banner acknowledges that it was an MPPAA employer before March 1983 solely by virtue of the MPPAA's provisions that label it a control group due to Banner's ownership of 100 percent of Commercial's stock. Banner

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[2] *continued*

is imperative where a right or benefit depends on that verb. *Allied Fidelity Insurance Co. v. State*, 415 So.2d 109, 111 (Fla.3d D.C.A. 1982). *Cf. Stewart v. Chevron Chemical Co.*, 762 P.2d 1143, 1145 (Wash. 1988) ("should"—as distinguished from "shall,"—can be discretionary, not obligatory); *Cusumano v. Ratchford*, 507 F.2d 980, 985 (8th Cir. 1974) ("should," not "shall," can be not mandatory but precatory).

insists that it ceased being an employer after March 1983 when its control of Commercial was severed. By contrast, Banner claims that there is no question that Commercial was an "employer," both before and after the 1983 ESOP, and that Banner never has had any collective bargaining relationship with the Teamsters generating any contractual obligation to contribute to Central States. Thus Banner maintains that it never has been a direct MPPAA employer.

Banner acknowledges that it could be held liable as an employer for the withdrawal if Central States' allegations of fraud were proved. But it asserts that disputes over employer status are not arbitrable. Under Banner's theory, when a pension plan seeks to impose liability upon a party other than the contributing employer, it is for the court (not an arbitrator) to determine in the first instance whether that party shares liability with the contributing employer.

Banner's concern is that a party that undeniably severed its control group status with a contributing employer might find itself a decade later forced to make interim payments to a plan to which it never had contributed, and further find itself required to prove in an arbitration proceeding that a pension plan's allegations of sham are unreasonable or clearly erroneous. Banner maintains that the MPPAA's interim payment determination that a party be assessed withdrawal liability not only is made on an ex parte basis, but this ex parte decision is made by inherently biased private parties: the pension plan's trustees. Also, since the MPPAA provides that the decision of the pension fund's trustees are presumed correct in arbitration, Banner could never receive an impartial review of the legal determination.

Central States' Claims.

Since this is a withdrawal liability claim, Central States focuses on the MPPAA provision which provides that any covered dispute between an employer and a plan spon-

sor shall be resolved by arbitration. Central States claims that when an employer has withdrawn from a multiemployer pension plan, that plan's trustees must ascertain the amount of the employer's withdrawal liability, notify the employer, and demand payment.

Central States calls Banner's characterization of this dispute (about whether Banner is an "employer") misleading. As Central States sees it, this suit hinges upon Banner's challenge to Central States' conclusion that the main reason Banner caused Commercial to engage in the ESOP transaction was to evade or avoid withdrawal liability. Thanks to the ESOP ploy, Banner was not an employer at the time of the 1984 assessment; this was Banner's shield. But under the MPPAA, Central States' determination that a principal aim of the ESOP transaction was to evade or avoid withdrawal liability required Central States to pierce that shield. According to Central States, Banner used the ESOP transaction as a ploy in order to "evade or avoid" withdrawal liability by attempting to discard its employer identity at the time of the 1984 assessment. Central States insists that Banner is still an employer and the dispute on withdrawal liability must be arbitrated.

Central States chides Banner for citing no precedent of its hypothetical of an employer which legitimately had severed its control group status a decade earlier and then was compelled to make interim payments and submit to arbitration. But Central States points out that were Banner's position accepted, employers confronting substantial withdrawal liability through troubled subsidiaries would engage in transactions with the principal aim of avoiding withdrawal liability, after being assured that pension plans cannot prevail against them unless the plans can prove fraud in a federal court. Central States maintains that Congress intended no such thing in enacting the MPPAA.

Thus Central States concludes that Banner is an employer, but because it did not submit to arbitration within the specified time, it has waived the right and must pay the full amount of the withdrawal liability.

II. DISTRICT COURT OPINION

In a comprehensive and well-reasoned opinion, Judge Plunkett referred Banner's demand to arbitration and ordered Banner to make monthly "interim payments" pending arbitration. The court rejected Central States' contention that Banner had waived arbitration because Banner had not raised the arbitrator's jurisdiction issue until the district court proceedings. *Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 657 F. Supp. 875 (N.D. Ill. 1987) ("*Banner I*").[3]

Judge Plunkett recognized that Congress enacted the Employee Retirement Income Security Act in 1974 to guarantee that employees who had been promised certain benefits upon their retirement actually received them. Congress amended the statute in 1980 to resolve special problems arising when individual employers terminate their participation in, or withdrawal from, multiemployer plans. Employer withdrawals diminish each plan's contribution base. This pushes the contribution rate for the remaining employers to increasingly high levels to fund past service liabilities, including liabilities created by employers no longer participating in the plan (so-called inherited liabilities). These mounting costs can force further withdrawals, triggering a vicious downward spiral which can kill the pension plan.

The trial court found that Congress' enactment of the MPPAA met this threat by mandating that an employer who either completely terminates or partially reduces its

[3] The district court reserved ruling on whether Banner was required to pay all arrearages on the interim payments. *Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 657 F.Supp. 875, 885 (N.D. Ill. 1987) ("*Banner I*"). Central States moved for an award of past due interim payments, interest, liquidated damages, and attorney's fees. *Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 663 F.Supp. 1292, 1293 (N.D. Ill. 1987) ("*Banner II*"). Central States' motion was granted. *Id.* at 1300.

contributions to a multiemployer pension fund pay its proportional share of the plan's unfunded but vested benefit liability at the time of the employer's termination or reduction of contributions. An employer completely withdraws from a multiemployer plan when it either permanently ceases to have an obligation to contribute under that plan, or it permanently ceases all covered operations under the plan.

But Judge Plunkett noted that Congress provided that, assuming certain demanding conditions are met, a complete or partial withdrawal need not occur solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party, the seller ceases covered operations or ceases to have an obligation to contribute for such operations. And an employer is not considered to have withdrawn from a plan solely because an employer ceases to exist by reason of a change in corporate structure if the change causes no interruption in employer contributions or obligations to contribute under the plan. It was with this statutory framework in mind that the district court addressed this dispute.

The threshold question of which tribunal should hear the matter upon the merits was difficult, as Judge Plunkett saw. The difficulty arises primarily due to the parties' failure to agree upon the real issue: Banner contended to the district court that its "employer" status ceased in March 1983 upon transfer of Banner's majority control of Commercial to the ESOP. Banner supposedly then ceased being a single employer with Commercial for MPPAA liability purposes because it ceased to be under common control with Commercial. Banner further asserted that the question of its "employer" status is for a court to decide because the statute's mandatory arbitration provision applies only to disputes between a plan sponsor and an employer. *Id.* at 879.

Central States denied that the issue before the district court was whether or not Banner was an "employer" for withdrawal liability purposes, because Banner conceded

that before March 1983 it had been such a statutory employer. *Id.* Central States instead characterized the true issue as whether Banner was exempt from withdrawal liability following implementation of the ESOP. *Id.* at 879-80. Central States asserted that because the ESOP did not meet all statutory requirements Banner was properly assessable for withdrawal liability. Moreover, Central States styled the issue as whether a major aim of the ESOP transaction was to evade withdrawal liability; if so, consistently with the statute the plan still could assess and collect withdrawal liability notwithstanding the ESOP transaction. Resolution of either the Central States exemption question or the Central States evasion question in Central States' favor must entitle Central States to assess liability against Banner. *Id.* at 880.

In holding that the appropriate forum for resolving the "employer" dispute is arbitration, the district court began with the premise that until the date of the transaction in question Banner admittedly was a statutory "employer." *Id.* at 881. The statutory scheme anticipates that once an entity is an employer it will be considered to have withdrawn when it permanently ceases to have an obligation to contribute under the plan, and will be liable for withdrawal liability unless the employer finds a statutory safe-haven.

The district court determined that the question of whether one *remains* an employer as of a withdrawal date is not identical to the question of whether one ever became an employer for MPPAA purposes. The former question is an arbitrator's issue because its resolution hinges upon applying the MPPAA provisions concerning employer withdrawals specifically assigned by Congress to the arbitrator's purview. *Id.* at 882. The latter question is one for a court because its resolution decides the arbitrator's authority over a dispute, but it is not the question truly at contest here. *Id.* The factual controversy here turns more upon Banner's continued employer status, and not upon its "employer" status per se. This continued

employer status issue is proper for arbitrator determination. *Id.* at 883.

Central States argued that the district court should enter judgment in Central States' favor for the full amount of the assessment because the statutory time limitations for initiating arbitration had expired. Central States contended that Banner had waived its right to arbitrate the fact or the sum of Banner's withdrawal liability. *Id.* The statutory time limits are strictly construed so that failure to begin arbitration within those limits does constitute waiver of that option. *Id.* at 883-84.

Yet this strict forfeiture rule is relaxed, as the trial court properly understood, if an employer has taken actions warranting tolling of the statutory deadlines. *Id.* at 884. Banner's filing of its suit tolled the statutory deadline set forth in § 1401(a)(1). Banner did not simply rest upon its rights. When first notified by Central States of the assessment of withdrawal liability Banner filed its district court complaint well before the period for initiating arbitration had run.

Accepting Banner's tolling argument does not permit every employer contesting withdrawal liability to ignore statutory deadlines with impunity merely by styling its challenge as a question for resolution by the court, even when as here such characterization is without merit. *Id.* In a tolling case like Banner's, Judge Plunkett explained, the issues presented question the arbitrator's authority to bind the parties. When the question is whether one of the parties falls within the arbitrator's jurisdiction, fairness considerations mandate that the deadline for arbitration be tolled until determination is made that the party is subject to mandatory arbitration. The district court recognized that this Banner issue had not been definitively decided previously. *Id.* at 885.

Subsequently, in a decision reported at 663 F. Supp. 1290 (N.D. Ill. 1987), the court certified two questions for appeal. Those questions were as follows:

> 1. Whether a corporation which, together with its subsidiary, was admittedly a control group employer under MPPAA and, as such, required by MPPAA to arbitrate any challenges to its withdrawal liability arising from the subsidiary's withdrawal, remains subject to MPPAA's arbitration requirement when that corporation has divested itself of control of the subsidiary prior to the subsidiary's withdrawal.
>
> 2. Whether, assuming arbitration is required, Banner's filing of a lawsuit in federal court raising the issue whether, under these circumstances, a party is subject to MPPAA's mandatory arbitration procedures, an issue not previously decided by the court of appeals, may toll the time period for initiation of that arbitration.

663 F. Supp. at 1291.

For the reasons expressed by the district court in its opinion, the answer to both questions is "yes."

III. ANALYSIS

A. *Whether Banner was an employer.*

After the district court's decision, the Third Circuit affirmed a District of Delaware decision discussed by the district court here on pages 880-81 of its opinion. We consider the Third Circuit's opinion in *Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241 (3d Cir. 1987), to be persuasive authority on the issues raised by these parties. See also *ILGWU Nat. Retirement Fund v. Levy Bros. Frocks*, 846 F.2d 879, 886 (2d Cir. 1988), which observed that several circuits have agreed that an employer can be subject to the arbitration provisions of MPPAA even if it arguably was not obligated to contribute to a multiemployer plan during the relevant period for determining withdrawal liability.

Flying Tiger Line, like *Banner Industries*, also required determining whether a federal district court or an arbitrator should resolve whether an entity is an employer

subject to the MPPAA, an issue arising in the "evade or avoid" context of § 1392(c). *Flying Tiger Line*, 830 F.2d at 1243. In perspective of an excellent and complete overview of the MPPAA, *id.* at 1243-44, that Third Circuit opinion explained that the District of Delaware had certified the following question for appeal:

> May a corporation that legitimately believes its status as a MPPAA "employer" is doubtful have that issue resolved by a federal court in a timely declaratory action, wherein the federal district court will determine the legal and factual issues necessary for a determination that the corporation is subject to MPPAA liability and procedures, or must the issue of MPPAA applicability and liability instead be determined by a MPPAA arbitrator?

Id. at 1247, quoting *The Flying Tiger Line, Inc. v. Central States, Southwest & Southeast Areas Pension Fund*, No. 86-304, mem. order ¶ 1 (D. Del. Dec. 4, 1986). The Third Circuit concluded that where the party against which withdrawal liability is asserted surely had been a part of the controlled group of an employer subject to the MPPAA at some juncture, and where the disputed questions fall within the scope of MPPAA provisions which are explicitly designated for arbitration, the statute's dispute resolution machinery must be invoked. *Flying Tiger Line*, 830 F.2d at 1247.

In *Flying Tiger Line*, Tiger International, Inc. (Tiger) contended that the issue was whether Tiger was an "employer" at the time of a bankrupt's withdrawal from the bankrupt's multiemployer pension plans. *Id.* at 1247. But the primary dispute between Tiger and the funds was whether a crucial sale by Tiger must be ignored under the MPPAA "evade or avoid" provision. *Id.* This being the case, the Third Circuit was guided by clear § 1401(a)(1) language: disputes between an employer and the plan sponsor of a multiemployer plan concerning determinations made under §§ 1381-1399 of that Title should be resolved via arbitration. *Id.* at 1247-48. *Flying Tiger Line*, like this

case, is an "evade or avoid" case, not an "employer" case. *Id.* at 1248.[4]

Tiger proposed that an alleged employer may bring a declaratory judgment action to have its status determined before such a corporate entity need arbitrate. *Id.* at 1249. Although no provision of MPPAA specifically defines who resolves issues of the status of a one-time employer, the statutory framework expressly provides that once an entity is an employer it will be deemed to have withdrawn when permanently ceasing to have an obligation to contribute under the plan. 29 U.S.C. § 1383(a). Under § 1381 such an employer is assessed withdrawal liability, unless satisfying the statutory provision relieving it of such liability. *Id.* at 1250.

The Third Circuit approvingly drew upon the excellent legal discussion by the district court in this case to satisfy itself that the question of whether one remains an employer on the date of withdrawal is not identical to the question of whether one ever became an MPPAA employer. The focus of the *Flying Tiger Line/Banner Industries* controversy is on continued employer status, an inherently different problem from mere "employer" status. *Id.* at 1250-51. Courts that have resolved employer status questions before arbitration have confronted entities which,

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[4] The Third Circuit was well aware of how strongly *Banner I* and *Flying Tiger* mutually reinforce one another, dropping this footnote:

> *Cf. Banner Indus., Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 657 F.Supp. 875, 881-81 (N.D. Ill. 1987) ("The issue presented by Banner . . . is not whether Banner is an 'employer' as defined by the statute, but rather whether Banner at some point *ceased* to be an employer by ceasing to possess those characteristics [that] caused it to be deemed an employer—in this case, by divesting itself of a majority of its ownership interest in Commercial in March 1983.") (original emphasis).

Flying Tiger Line v. Teamsters Pension Trust Fund, 830 F.2d 1241, 1250 n.14 (3d Cir. 1987).

unlike those of *Flying Tiger Line/Banner Industries*, never had been employers subject to the MPPAA, and which therefore legitimately challenged application of the MPPAA dispute resolution process to them. *Id.* at 1251.

Tiger claimed that because its complaint challenged the applicability of the entire MPPAA administrative scheme to its dispute, Tiger could not be compelled to arbitrate the question of arbitral jurisdiction. *Id.* But the *Flying Tiger Line* district court had not compelled Tiger to arbitrate a legal question of the arbitrator's jurisdiction, but had considered the statutory issue and decided that the dispute was arbitrable under § 1401. *Id.* at 1251-52. Here, likewise, the district court considered the statutory issue and decided the dispute must be arbitrated under the MPPAA. The Third Circuit affirmed the district court order staying the first count of Tiger's complaint pending MPPAA arbitration. For the reasons articulated by the Third Circuit in *Flying Tiger Line*, we affirm the district court here.

B. *Whether time for initiating arbitration is tolled.*

Having decided that the issue of employer status is arbitrable, we now must decide whether Banner waived its right to arbitrate by filing first in district court. A statute of limitations may be subject to both waiver and equitable tolling. *Zipes v. TWA, Inc.*, 455 U.S. 385, 393 (1982). Because the issue raised by Banner was a difficult one, and because Banner moved decisively to present the issue in court within the statutory time period for arbitration, the district court held that Banner's filing suit in federal court tolled the statutory time frames set out in § 1401(a)(1). "This is not a case in which the party assessed did absolutely nothing, waited until the pension filed a collection against it, and then for the first time tried to assert its defenses in court when it should have proceeded in arbitration. Banner took the immediate and affirmative steps to contest its liability."

We will uphold a district court's exercise of its equitable power unless the court has abused its discretion. *Cf. Ohio*

v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 693-94 and 693 n.13 (10th Cir. 1981). Under the circumstances of this case, Banner did risk waiving the statute of limitations, and the court could have ruled either way. But under this deferential standard of review, we conclude that the district court did not abuse its discretion in holding that Banner did not waive its defenses to withdrawal liability by first seeking declaratory relief in the district court.

Not every imaginable question of statutory construction will toll the period during which arbitration must begin. Certainly the next similarly-situated employer who litigates rather than arbitrates will do so in the face of our opinion here. Litigation under similar circumstances could be considered frivolous, and any hardship suffered by avoiding arbitration would be a "self-inflicted wound." *See I.A.M. National Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 426-27 (D.C. Cir. 1987).

IV. CONCLUSION

Banner, together with its subsidiary (Commercial), was admittedly an employer under the MPPAA. The MPPAA requires an employer to arbitrate any challenges to its withdrawal liability. When Commercial withdrew, Banner remained subject to that arbitration requirement even though it had divested itself of control of Commercial prior to Commercial's withdrawal. Banner's filing of a lawsuit in federal court questioning whether, under these circumstances, it was subject to MPPAA's mandatory arbitration procedures, tolled the time for initiation of that arbitration. Consequently, the decision of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 86 C 3046

Honorable Paul E. Plunkett

BANNER INDUSTRIES, INC.,
Plaintiff/Counterdefendant,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and its present Trustees in their capacity as Trustees,
Defendants/Counterclaimants,

and

PEPSICO, INC., et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

Banner Industries, Inc. ("Banner") brought this action against, among others, Central States, Southeast and Southwest Areas Pension Fund ("Central States"), seeking a declaratory judgment that Banner is not liable to Central States for any portion of a demand for withdrawal liability[1] in the amount of $19,808,781.43 made against Banner by

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[1] "Withdrawal liability" refers to an amount owed to a pension plan by an employer which terminates or reduces its contributions to the plan. The withdrawal liability is the amount determined to be the allocable amount of unfunded vested benefits at the time of the employer's withdrawal, subject to certain adjustments. *See* 29 U.S.C. §§1381, 1391 and discussion *infra* at 4-9.

Central States pursuant to §4202 of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §1382. The dispute currently before this court requires us to review Count I of the complaint, in which Banner claims that it is not an "employer" under the statute and thus not liable for the withdrawal liability assessed against it. Three fully-briefed motions are ready for ruling: (1) Central States' motion to dismiss or, in the alternative, for summary judgment on Count I; (2) Banner's cross-motion for summary judgment on that count; and (3) Central States' motion for summary judgment on its counterclaim for interim payments. We have jurisdiction pursuant to §4301 of MPPAA, 29 U.S.C. §1451, and 28 U.S.C. §1331. For the reasons set forth below, Central States' motion to dismiss Count I is granted, and this case is referred to arbitration; Banner's cross-motion for summary judgment is denied; and Central States' motion for summary judgment on its claim for interim payments is granted.

Facts[2]

Prior to March 1983, Banner had a wholly-owned subsidiary, Commercial Lovelace Motor Freight, Inc. ("Commercial"), which was in the business of interstate trucking. Most of Commercial's hourly employees were represented by the International Brotherhood of Teamsters ("Teamsters"), and, pursuant to collective bargaining agreements

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[2] For purposes of a motion to dismiss, we accept the plaintiff's well-pleaded allegations as true and view them, together with the reasonable inferences to be drawn therefrom, in the light most favorable to the plaintiff. *Powe v. City of Chicago*, 664 F.2d 639, 642 (7th Cir. 1981). The facts in this case are largely undisputed. It is the application of the law to the facts that is strenuously contested, as is reflected in the parties' oversized briefs as well as in their numerous submissions of and argument over additional authority in support of their respective claims.

with the Teamsters, Commercial contributed to various multiemployer pension plans, including Central States.

In March 1983, allegedly in an effort to reverse operating losses suffered by Commercial, Banner established an employee stock ownership plan ("ESOP") and transferred 50.01% of Commercial's stock (4,001,000 shares) to the ESOP. Thus, in March 1983, Banner no longer retained majority control of Commercial. Commercial continued to make payments to Central States under collective bargaining agreements with the Teamsters for two years following the implementation of the ESOP.

Between July 1983 and June 1985, Banner sold its remaining stock in Commercial. In July 1983, Banner sold 790,000 of its shares to CL Investors, a partnership consisting of certain Commercial officers and directors, thereby reducing its ownership in Commercial to approximately 40%. In February 1985, Banner sold another 400,000 of its shares of Commercial to Gerald W. McIntyre, president of Commercial, and in June 1985, Banner sold all of its remaining 2,809,000 shares of Commercial to McIntyre. In March 1985, Commercial ceased all operations and, as a result, ceased to make contributions to Central States on behalf of its employees.

Central States now demands payment by Banner of liability assessed under the withdrawal provisions of MPPAA as a result of Commercial's cessation of operations in 1985. Banner opposes that assessment of withdrawal liability on the ground that it was not an "employer" within the meaning of MPPAA when Commercial withdrew because Banner had sold its controlling interest in Commercial two years before and, accordingly, ceased to have any obligation for Commercial's withdrawal liability. Central States, on the other hand, argues that Banner was unquestionably an employer before March 1983; consequently, any dispute about its withdrawal liability must be brought before an arbitrator, not this court. Central States further

urges, however, that the time granted by the statute in which to initiate arbitration has long since expired, and that Central States is thus entitled to judgment for the full $19,808,781.43. In the event this court finds that Banner has not waived its right to contest its withdrawal liability in arbitration, Central States nonetheless argues that it is entitled to interim payments during the pendency of the dispute. Our analysis necessarily begins with an examination of the statute.

Discussion

I. MPPAA

Congress enacted The Employee Retirement Income Security Act ("ERISA") in 1974 in an effort to ensure that employees who have been promised certain benefits upon their retirement actually receive those benefits. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). In 1980, Congress amended the statute, 29 U.S.C. §1381 *et seq.*, to deal with the special problems that arise when individual employers terminate their participation in, or withdraw from, multiemployer plans. *See Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984). Thus, as explained in the Supreme Court's decision in *Gray*:

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage - or force - further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base.

> This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

467 U.S. at 723 n.2 (quoting *Pension Plan Termination Issues: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 22 (1978) (statement of Matthew M. Lind, Executive Director of the PBGC)).

Congress' enactment of MPPAA corrects this deficiency in the statutory scheme by mandating that an employer who either completely terminates or partially reduces its contributions to a multiemployer pension fund pay a proportionate share of the plan's unfunded vested benefit liability at the time of the employer's termination or reduction of contributions. This termination or reduction of contributions by the employer is referred to in the statute as a complete or partial "withdrawal" from the plan. *See* §1381. An employer completely withdraws from a multiemployer plan when it either "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." §1383.[3] In the event of a withdrawal from a multiemployer plan, the plan sponsor determines the amount of the employer's withdrawal liability in accordance with §1381 and §1391, notifies the employer of the amount of the withdrawal liability, and collects that amount from the employer. *See* §1382.

Several other provisions of MPPAA, however, provide protection against a withdrawal liability assessment to employers who otherwise cease to have an obligation to contribute or cease all covered operations under the plan. For example, Congress specifically provided that, assuming cer-

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[3] Because the parties agree that if any withdrawal occurred, it was a complete withdrawal, we need not consider those provisions dealing with "partial" withdrawals, e.g., §§1385, 1386, 1388.

tain stringent conditions are met, a complete or partial withdrawal *not* occur "solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party . . . , the seller ceases covered operations or ceases to have an obligation to contribute for such operations." §1384. Similarly, under §1398(1), upon which Banner relies in this case, "an employer shall not be considered to have withdrawn from a plan solely because . . . an employer ceases to exist by reason of . . . a change in corporate structure described in section 1362(d) of this title . . . if the change causes no interruption in employer contributions or obligations to contribute under the plan." Under §1398(2) (upon which Banner does *not* rely), an employer shall not be considered to have withdrawn from a plan solely because the employer suspends contributions under the plan during a labor dispute involving its employees. Notwithstanding these provisions which protect an employer, however, Congress also provided in §1392(c) that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction."

The statute further provides an explicit procedure by which an employer may dispute a determination that it should be assessed withdrawal liability. Under §1399(b)(1)(A), (B), a plan sponsor is obligated "[a]s soon as practicable after an employer's complete or partial withdrawal" to (1) notify the employer of the amount of the liability and the schedule for liability payments, and (2) demand payment in accordance with the schedule. Section 1399(b)(2)(A) then provides:

> No later than 90 days after the employer receives the notice described in paragraph (1), the employer -
>
> (i) may ask the plan sponsor to review any specific matter relating to the determination of

the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

The plan sponsor must then notify the employer of the plan sponsor's decision, the basis for the decision, and the reason for any change in the determination of the employer's liability or schedule of liability payments. §1399(b)(2)(B).

Under §1401(a)(1), a section crucial to Central States' motion to dismiss, "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration." Further, under §1401(b)(1), "[i]f no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor." Finally, under §1399(c)(2), "[w]ithdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor . . . beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule." Likewise, under §1401(d), where resolution of a dispute calls for arbitration,

> Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or un-

> derpayments arising out of the decision of the arbitrator with respect to the determination.

With this statutory framework in mind, we turn to the dispute before us.

II. Central States' Motion to Dismiss or for Summary Judgment

Central States has moved to dismiss Count I on the ground that, whatever the merits of Banner's arguments regarding its withdrawal liability, the statute requires that those arguments be brought before an arbitrator for resolution. Banner, on the other hand, argues that only an "employer" is required to arbitrate and that the uncontroverted facts before the court demonstrate that it was not an "employer" in 1985. Banner thus concludes that this court is the appropriate forum in which to dispute its withdrawal liability.

The difficulty in deciding this threshold question, i.e., which tribunal should hear this matter on the merits, arises largely as a result of the parties' failure to agree on what is really at issue. This failure, in turn, is a result of the parties' disagreement as to the legal effect of the implementation of the ESOP. Banner argues that it plainly ceased to be an "employer" for purposes of MPPAA liability in 1983 when the ESOP was established. Banner concedes that prior to March 1983, Banner was an MPPAA "employer" by virtue of §1301(b)(1), which provides, in relevant part:

> For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses . . . which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations pre-

scribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

The applicable provision of Title 26 provides in essence that a parent corporation that controls 80% or more of the voting stock of a subsidiary is considered to be a single employer with the subsidiary. 26 U.S.C. §1563(a)(1).[4] Thus, Banner admits that it could be held liable for Commercial's withdrawal prior to March 1983 since at that time it owned 100% of Commercial's stock. *See* Banner's Br., Aug. 6, 1986, at 15-16. Banner takes the position, however, that its "employer" status terminated in March 1983 when Banner transferred its majority control of Commercial to the ESOP. At that point Banner ceased to be "under common control" with Commercial and thus ceased to be a single employer with Commercial for purposes of MPPAA liability. Banner therefore concludes that it cannot be held liable for Commercial's withdrawal in 1985. In any event, Banner argues, the issue to be decided is Banner's "employer" status, and that issue is one that the court must decide because the statute's mandatory arbitration provision applies only to "dispute[s] between *an employer* and the plan sponsor." §1401(a)(1) (emphasis added). Banner insists that this court must first decide whether Banner is an employer before Banner can be compelled to arbitrate. Banner urges that the "employer" issue is an appropriate one for the court to address in any case because it involves a question of pure statutory construction.

Central States takes a much different view of the effect of Banner's actions for purposes of MPPAA liability. First,

[4] Title 26 U.S.C. §414(c), referred to in §1301, provides that corporations which are under common control shall be treated as single employers and provides that "[t]he regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b)." Subsection (b), in turn, defines a controlled group of corporations as being within the meaning of §1563(a). Therefore, the provisions of §1563(a) apply to "control group" withdrawal liability.

Central States denies that the issue for this court is whether or not Banner is an "employer" for purposes of assessing withdrawal liability. Central States points out that Banner *agrees* that until March 1983 it was an "employer" as that term is defined in the statute. Thus, Central States concludes, Banner's "employer" status is not open to dispute. Rather, the issue is whether Banner is exempt from withdrawal liability following the implementation of the ESOP because of §1398(1). Central States takes the position that the ESOP did not meet all the requirements of §1398(1),[5] and Banner was properly assessed for withdrawal liability. In the alternative, Central States argues that the issue is whether a principal purpose of the ESOP transaction was to "evade or avoid" withdrawal liability. If so, the plan may, under §1392(c), assess and collect the withdrawal liability without regard to the ESOP transaction. Central States maintains that resolution of either of these two issues—the applicability of the §1398(1) exemption or the §1392(c) "evade or avoid" question—in Central States' favor entitles Central States to assess withdrawal liability against Banner. Central States insists that these issues are the type expressly left to arbitration under §1401(a)(1), which provides that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan *concerning a determination made under sections 1381 through 1399* of this title shall be resolved through arbitration." (emphasis added).

The parties have supplied the court with a plethora of citations to authority in support of their respective positions. The case most closely resembling ours is *Flying Tiger Line, Inc. v. Central States, Southwest and Southeast Areas Pension Fund*, No. 86-304 CMW (D. Del. Oct. 17,

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[5] Specifically, Central States maintains that the ESOP transaction caused Commercial to withdraw; therefore, the change in corporate structure did not meet the requirement that it "cause[ ] no interruption in employer contributions or obligations to contribute under the plan."

1986), *leave to appeal granted*, No. 86-8060 (3d Cir. Dec. 31, 1986). The plaintiffs in *Flying Tiger*, Tiger International, Inc. and its subsidiaries ("Tiger"), in January 1980 owned 100% of the stock of Hall's Motor Transit Co. ("Hall's"), a large interstate trucking company. Pursuant to collective bargaining agreements with most of its hourly employees, Hall's contributed to a number of multiemployer pension plans, including the defendants.

After Hall's lost substantial amounts of money over several years, Tiger in January 1985 sold 75% of its Hall's stock to Hall's Acquisition Corp. ("HAC"). HAC agreed to cause Hall's to continue to make payments to the various multiemployer pension plans. Hall's continued to make the required contributions until it filed for reorganization in March 1986. The defendants sought to hold Tiger liable for Hall's withdrawal, and Tiger brought an action seeking a declaratory judgment that it was not liable to the defendants under MPPAA, arguing in count I that Tiger was not an "employer" for purposes of MPPAA and therefore was not subject to the MPPAA's procedures.

The district court in *Flying Tiger*, like this court, was faced with some difficulty in defining the issue to be decided:

> The parties' major dispute concerns what needs to be decided to dispose of Count I. Plaintiffs contend that the issue to be decided is whether or not Tiger was an "employer" when Hall's withdrew. The arbitration provision of the MPPAA states that "Any dispute between an *employer* and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 ~~through~~ 1399 of this title should be resolved through arbitration." 29 U.S.C. §1401(a)(1) [emphasis added]. Because the arbitration only applies to employers, Tiger argues, a court must first determine whether, as a matter

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> of law, Tiger is an employer before an arbitrator has power to resolve a dispute.
>
> The Funds, however, view the issue raised in Count I differently. To them, the real issue that needs to be decided concerns the January 1985 transaction in which Tiger sold 75% of Hall's to Hall's Acquisition Corp. ("HAC") . . . . The Funds argue that this was a sham transaction whose purpose was to avoid the withdrawal liability. . . . Under 29 U.S.C. §1392(c): "If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction." Significantly, any dispute arising under § 1392 is subject to the arbitration procedures. Therefore, the Funds argue, the issue to be decided belongs before an arbitrator not before the Court.

Flying Tiger, No. 86-304 CMW at 6-7 (citations omitted).

The court in *Flying Tiger* agreed with the pension funds. Noting what the judge perceived to be an inherent conflict in the statute, the court nonetheless found that the pension fund had the better argument, reasoning:

> Prior to the 1985 transaction, Tiger owned 100% of Hall's; therefore, Tiger was undisputably in the "employer" control group of Hall's until the transaction. If that transaction is proven to be one subject to 29 U.S.C. § 1392(c), then the Funds are free to ignore the transaction and assert liability against Tiger. If the transaction is held to be an "evade or avoid" transaction, then Tiger was an "employer" on the date Hall's withdrew. But characterizing the issue to be decided as whether or not Tiger was an "employer" is a broad brush description of a specific issue. The case really turns on the determination of the

> "evade or avoid" question, a question properly before the arbitrator.

Id. at 7. In the *Flying Tiger* court's view, the inherent conflict in the statute was that on the one hand the arbitrator is only to resolve disputes between employers and pension funds while on the other hand, the arbitrator must resolve the "evade or avoid" issue. The court was unable to envision a situation in which the "evade or avoid" situation would arise except when the entity from whom payments are sought no longer owns the entity that actually withdrew. Thus, the court concluded that if the arbitrator were only free to decide issues involving an undisputed employer, Congress would not have empowered the arbitrator to decide §1392(c) disputes. *See id.* at 8.

To the extent the *Flying Tiger* court took the view that all disputes arising under §1392(c) would necessarily encompass an "employer" issue, we respectfully disagree. In certain matters involving §1392(c), an employer's status will be beyond question. For example, it is possible that an undisputed employer might fabricate a labor dispute with its employees in order to suspend its contributions to the pension fund without incurring withdrawal liability under §1398(2). In this situation, the pension fund might well seek to assess withdrawal liability against the undisputed employer under §1392(c).

In spite of our disagreement with the *Flying Tiger* court's view that §1392(c) issues must be synonymous with "employer" issues, we nevertheless agree with that court that the appropriate forum for resolution of these disputes is arbitration. We begin with the same fundamental premise as the *Flying Tiger* court, i.e., until the date of the transaction in question, Banner was, and admits that it was, an "employer" under §1301. As a result, contrary to Banner's contention, we do not have an issue of statutory construction, and Banner's citations to cases upholding the proposition that the "employer" determination is a sta-

tutory issue for the courts are thus inapposite. In each of those cases, the court was required to interpret the statute in order to decide whether the entity at risk had *ever* been an "employer" as defined by the statute when the withdrawal occurred. *See, e.g., IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 123-24 (3d Cir. 1986) (court required to determine whether interest in stock was an option, and, if so, whether resulting constructive ownership rendered corporation as having "controlled group status" under ERISA); *Paperworks Pension Plan v. Arlington Sample Book Co.*, 5 E.B.C. 1948 (E.D. Pa. 1984) (whether president and sole shareholder of undisputed employer was himself an "employer" under ERISA); *Baldwin v. Shopmen's Ironworkers Pension Trust*, 3 E.B.C. 1713 (C.D. Cal. 1982) (whether two sole shareholders were "employers").

The issue presented by Banner, by contrast, is not whether Banner is an "employer" as defined by the statute, but rather whether Banner at some point *ceased* to be an employer by ceasing to possess those characteristics which caused it to be deemed an employer—in this case, by divesting itself of a majority of its ownership interest in Commercial in March 1983. There exists in the statute no provision indicating the circumstances under which, as a matter of law, an employer ceases to be an employer and because of that fact alone ceases to be responsible for withdrawal liability. On the contrary, the statutory scheme specifically provides that once an entity is an employer, it will be deemed to have withdrawn when it "permanently ceases to have an obligation to contribute under the plan," §1383, and will be liable for withdrawal liability, §1381, unless that *employer* finds a statutory safe-haven. Whether the requirements of this safe-haven have been satisfied necessarily turns on the facts of each case. Put another way, the issue of whether one remains an employer on the date of a withdrawal is not the same issue as whether one ever became an "employer" for purposes of ERISA

generally and MPPAA in particular. The latter is an issue for the court since its resolution determines the arbitrator's authority over the dispute.[6] The former is an issue for the arbitrator since its resolution turns on the applicability of MPPAA provisions relating to employer withdrawals—provisions Congress specifically placed within the purview of the arbitrator. Banner attempts to bring itself within the latter issue; however, we are persuaded that the issue is really the former. Neither Banner nor Central States disputes that the statute was intended to cover Banner's relationship with Commercial; the dispute is over whether that relationship still existed on the date of Commercial's withdrawal. The determination of this issue, we reiterate, turns on the factual findings relating to the circumstances surrounding the ESOP transaction and not on any questions of statutory interpretation.[7]

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[6] Central States apparently takes the position that even this issue should be resolved by the arbitrator. *See* Central States' Br., Sept. 18, 1986, at 41 n.40. *But see Association of Flight Attendants v. Republic Airlines, Inc.*, 797 F.2d 352, 357 (7th Cir. 1986) ("It is certainly true that even where it is the arbitrator's task to resolve the merits of a dispute it remains the court's duty to determine the scope of the arbitrator's jurisdiction").

[7] Banner refers the court to *Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 639 F. Supp. 788, *subsequent opinion*, 640 F. Supp. 56 (E.D. Tenn. 1986) for the proposition that an entity which was not a control group parent on the date of the subsidiary's withdrawal could not be held liable for the withdrawal. Banner's reliance on *Central Transport* is misplaced. Central Transport had entered into an agreement to purchase Mason & Dixon Lines, Inc., the parent of Tank Lines. This agreement, however, was subject to approval by the ICC. Before the approval was given, Tank Lines withdrew from the plan. The ICC *subsequently* gave its approval and the agreement was, in fact, consummated. The court held that Central Transport was not liable for the withdrawal of Tank Lines (actually the subsidiary of a subsidiary) because Central Transport did not exercise control over Tank Lines until *after* the withdrawal occurred. Accordingly, although the court did focus on "the date of Tank Lines' withdrawal," the court clearly found Central Transport not liable be-

Banner argues that the arbitrator's authority over a dispute cannot turn on the presence or absence of factual disputes, and that it would be erroneous to refer the case to arbitration simply because factual determinations may be required. Banner contends that any factual issues are subsumed in the larger issue of its "employer" status. Thus, Banner argues, in the event the factual determinations establish either that Banner "caused" the interruption in contributions from Commercial in 1985 (and thereby failed to meet the requirements of §1398(1)) or that a principal purpose of Banner in undertaking the ESOP transaction was to "evade or avoid" withdrawal liability, then Banner was still an "employer" at the time of Commercial's withdrawal and, as such, liable for that withdrawal. Conversely, if the factual determinations establish that Banner did not cause an interruption in payments and that the ESOP was not established to evade or avoid withdrawal liability, then Banner was not an "employer" on the date of Commercial's withdrawal and cannot be held liable for that withdrawal. Either way, Banner insists, the ultimate issue is whether Banner was an "employer" for purposes of assessing withdrawal liability.

We agree with Banner that the scope of an arbitrator's jurisdiction cannot turn on the presence or absence of factual disputes. Any factual disputes material to a determination whether the arbitrator has power to adjudicate a matter must be decided by a court. *See Association of Flight Attendants v. Republic Airlines, Inc.*, 797 F.2d 352,

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cause it had *never been* an employer as of that date. The court did examine the possibility of constructive ownership by Central Transport before the withdrawal, a clear question of statutory construction, and rejected that argument. *See Central Transport*, 640 F. Supp. at 58-60. Thus, the court could conclude as a matter of law that Central Transport had never been an employer as of the date of Tank Lines' withdrawal. In this case, by contrast, the issue is whether Banner, an *admitted* employer with respect to Commercial *before* Commercial's withdrawal, should now beheld liable for that withdrawal. For all the reasons we explain above, we submit that this distinction is critical.

357 (7th Cir. 1986). However, we disagree with Banner that the factual disputes in this case bear on Banner's "employer" status. Rather, they bear on Banner's *continued* employer status, an inherently different question. It bears repeating that the statute does not contain language providing for changes in "employer" status as a result of certain actions by admitted employers; the statute provides only that in certain circumstances, an admitted employer will not be deemed to have *withdrawn* from the plan. It follows, then, that if Banner's sale of its wholly-owned subsidary is found not to have caused an interruption in contributions and not to have been a sham transaction, the legal effect is *not* that Banner was not an "employer"—this is simply not what the statute says—but is instead that Banner successfully effected a change in corporate structure without having withdrawn from the plan,[8] and that this change was not undertaken to evade or avoid withdrawal liability. Resolution of these issues in Banner's favor would establish that the plan sponsor's determinations were unreasonable or clearly erroneous,[9] and that Banner should not be assessed for Commercial's withdrawal. The point, however, is that it is the plan sponsor's determinations that are in issue, not Banner's employer status, and the statute unequivocally requires that disputes regarding the plan sponsor's determinations be resolved in

[8] We would note at this point that we have some difficulty understanding how Banner's ESOP transaction falls within the meaning of §1398(1). In particular, it does not seem to us either that Banner has "ceased to exist" by reason of a change in corporate structure described in §1362(d) or that Banner's "change in corporate structure" comes within any of those listed in §1362(d). Regardless of the court's concern, however, Central States has never contested the applicability of §1398(1) to transactions of this sort, arguing only that Banner is not entitled to the benefits of §1398(1) because the change in corporate structure caused an interruption in employer contributions. In any event, our ruling that the merits of this case must be resolved in arbitration renders the issue, to the extent there is one, moot in this court.

[9] *See* §1401(a)(3)(A) and note 12 *infra*.

arbitration. Because we find that Banner must contest its withdrawal liability assessment in arbitration, Central States' motion to dismiss is granted as to Count I.[10]

Central States urges that this court should enter judgment in its favor for the full amount of the assessment on the ground that the statute provides explicit time limitations within which to initiate the arbitration process, and Banner has allowed its time to expire. Central States thus concludes that Banner has waived its right to arbitrate the fact or amount of its withdrawal liability.

The case law interpreting the relevant provisions of MPPAA makes clear that the time limits are strictly construed and that failure to initiate arbitration within those time limits constitutes a waiver of the opportunity to do so. *See, e.g., Combs v. Harold*, No. 84-1789, mem. op. at 6-8 (D.D.C. Feb. 19, 1986); *Combs v. Pelbro Fuel, Inc.*, No. 83-1524, mem. op. at 9-16 (D.D.C. Nov. 15, 1984); *Combs v. Adkins & Adkins Coal Co.*, 597 F. Supp. 122, 126 (D.D.C. 1984); *Speckmann v. Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469, 473 n.2 (E.D. Mo. 1983); *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Ceazan*, 559 F. Supp. 1210, 1218 (N.D. Cal. 1983). These same courts have noted, however, that this strict forfeiture rule may be relaxed where the employer has taken certain actions which warrant a tolling of the statutory time frames. *See, e.g., Combs v. Adkins & Adkins Coal Co.*, 597 F. Supp. 122, 127 (D.D.C. 1984). *See also Republic Industries, Inc. v. Teamsters Joint Coun-*

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[10] As a result, we need not pass on Banner's motion to strike the affidavit of Edward R. Young, and we need not decide whether, as Banner argues, a disputed issue of fact exists as to whether the trustees of Central States in fact made the determinations Central States alleges, i.e., that Banner did not come within the §1398 safe-haven and that the ESOP transaction was designed to evade or avoid withdrawal liability. These matters, as well as resolution of any disputed issues found to exist, are for the arbitrator.

cil No. 83 of Virginia Pension Fund, 718 F.2d 628, 644 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

We think that Banner's filing of this suit tolled the statutory time frames set forth in §1401(a)(1). Like the court in *Flying Tiger*, we have found the issue raised by Banner to be a difficult one,[11] one that is not clearly addressed by the statutory provisions. Banner cannot be said to have rested on its rights. It was first notified by Central States of the assessment of withdrawal liability by a letter dated March 25, 1986, and it filed its complaint in this court on May 1, 1986, well before the period for initiating arbitration had run. This is not a case in which the party assessed did absolutely nothing, waited until the pension plan filed a collection action against it, and then for the first time tried to assert its defenses in court when it should have proceeded in arbitration. Banner took immediate and affirmative steps to contest its liability.

Central States argues that to accept Banner's tolling argument "would permit every employer contesting its withdrawal liability to ignore the statutory time limits with impunity simply by characterizing its challenge as an issue for resolution by the court, even where, as here, such

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[11] On December 4, 1986, the district court in *Flying Tiger* issued an opinion granting the employer's motion to permit an interlocutory appeal of its decision referring the matter to arbitration. Indicating that "[t]he Court has found the issues raised in Count I to be extremely difficult," op. at 4, the court certified the following question:

"May a corporation that legitimately believes its status as a MPPAA 'employer' is doubtful have that issue resolved by a federal court in a timely declaratory action, wherein the federal district court will determine the legal and factual issues necessary for a determination that the corporation is subject to MPPAA liability and procedures, or must the issue of MPPAA liability instead be determined by a MPPAA arbitrator."

The Third Circuit granted the motion for leave to appeal on December 31, 1986.

characterization is meritless." Central States' Rep. Br., Oct. 2, 1986, at 15. Central States distinguishes this case from *Republic Industries*, arguing that the basis for tolling the limitations period in *Republic Industries* was the court's determination that Republic had made a not frivolous challenge to the constitutionality of the arbitration procedures, the validity of which had not previously been definitively decided. Central States maintains that Banner has made no such similar challenge.[12]

We do not agree that a decision to toll the statutory time periods in this case would produce the dire results Central States predicts. The court does not today hold that every arguable issue of statutory interpretation will toll the running of the period in which to initiate arbitration. Rather, the court finds the issue raised by Banner to be similar to those raised by Republic in *Republic Industries* in that in both cases, the issues raised questioned

[12] The parties actually dispute whether Banner has made such a constitutional challenge. Banner refers in its briefs and, it argues, in its response to Central States' counterclaim to a due process challenge to MPPAA's arbitration procedures that is currently pending before the United States Supreme Court. *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir.), *prob. juris. noted*, ___ U.S. ___, 107 S. Ct. 567 (1986). Specifically, Banner urges that the presumption of correctness accorded the plan sponsor's determinations under §1401(a)(3)(A) deprives Banner of due process. Central States argues that any reference to this challenge was made in a procedurally improper fashion and was, in any event, untimely. Our ruling on the waiver question obviates the need to resolve this dispute.

To the extent Banner has properly articulated an argument that it would be unconstitutional to send Banner to arbitration, we note that Banner's challenge does not refer to the statutory *requirement* that it arbitrate, but only to the standard upon which the arbitrator is to review the plan sponsor's determinations. We further note that, as a practical matter, the Supreme Court will likely pass on the constitutionality of the presumption long before it becomes an issue in this case.

the *authority* of the arbitrator to bind the parties. Surely the arbitrator's role includes the application of the statutory provisions to the facts in a case. But if the issue is the constitutionality of the statutory provisions providing the arbitrator with his authority, as in *Republic Industries*, equity dictates that the time period for initiating arbitration be tolled until a determination is made that arbitration is not only proper but *possible*. Similarly, if the issue is whether or not one of the parties falls within the arbitrator's jurisdiction, as in this case, the same considerations of fairness dictate that the time of pursuing arbitration be tolled until a determination is made that the party is subject to the mandatory arbitration provisions. Like the issues raised in *Republic Industries*, the issue Banner raises has not been previously definitively decided. It is true that we have rejected Banner's argument, but we do not find Banner's position to be a frivolous one or one taken in bad faith. Accordingly, we conclude that Banner has not forfeited its right to initiate arbitration and that the filing of this action tolled the limitations period set forth in §1401(a)(1).

III. Banner's Motion for Summary Judgment

In view of this court's ruling that the merits of this case must be decided in arbitration, Banner's motion for summary judgment must be and is denied.

IV. Central States' Counterclaim for Interim Payments

Central States has filed a motion for summary judgment on its claim for interim payments. The statutory language in §1401(d) makes clear that the employer must make payments until the arbitrator issues a final decision on the matters submitted for arbitration, with adjustments to be made for overpayments (or underpayments) occurring as a result of the arbitrator's decision. Banner's only argument opposing Central States' demand is that the statute requires only "employers" to make interim payments. Banner's position that it is not an "employer" for purposes

of determining withdrawal liability under MPPAA thus applies equally to its contention that it need not make interim payments. By the same token, our rejection of Banner's argument regarding "employer" status applies equally in this context. Accordingly, Central States' motion for summary judgment on its counterclaim for interim payments is granted, and Banner is ordered to begin making those payments on April 1, 1987. The court reserves ruling on the issue whether Banner must also pay Central States all arrearages on the interim payments, which, but for the filing of this action, would have been made beginning no later than sixty days after the date of the demand under §1399(c)(2).

Conclusion

For all the foregoing reasons Central States' motion to dismiss is granted as to Count I, and this case is referred to arbitration. Banner's motion for summary judgment is, accordingly, denied. Central States' motion for summary judgment on its counterclaim for interim payments is granted, payments to begin on April 1, 1987.

ENTER:

/s/ Paul E. Plunkett
Honorable Paul E. Plunkett
District Court Judge

Dated: March 25, 1987